BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2003-01	)
	)
SAGEBRUSH POWER PARTNERS, LLC,	)
	)
KITTITAS VALLEY WIND POWER PROJECT	)
	)
	)
	)

INTERVENOR RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT) POST- HEARING RESPONSE BRIEF

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I. INTRODUCTION

Horizon Wind Energy LLC, through its subsidiary, Sagebrush Power Partners, LLC ("Horizon" or "Applicant" or "Sagebrush") has petitioned the Washington State Energy Facility Site Evaluation Council ("EFSEC" or the "Council") for preemption of local land use processes and determinations made by Kittitas County, Washington. Kittitas County has determined that the application is neither consistent nor compliant with the applicable comprehensive plan and zoning ordinance requirements. The extraordinary request is unprecedented in EFSEC history and represents a calculated and manipulated effort to circumvent legitimate public processes and determinations contemplated by Growth Management Act (GMA).

The siting of large and intrusive wind energy projects cannot be based only on the simple proposition that development of alternative energy facilities provides a public benefit. No one disputes that alternative energy represents a sound public policy. But that is not the question presented in the siting determination. The sole issue relates to locational choices and site specific review and decision. Local jurisdictions are particularly well suited to provide this analysis. And Kittitas County has evidenced the necessary discipline in reviewing applications to assure environmental and land use compatibility. That decision making process and authority should be respected and not circumvented by the preemption process.

Kittitas County engaged in a long and thoughtful process. A reasoned and established procedure was developed to consolidate comprehensive planning, zoning and development agreement procedures into a single integrated process. Sagebrush (and its predecessors) were aware of the process and neither participated nor appealed the adoption of the procedural guidelines. They now seek to collaterally attack those procedures in this proceeding. EFSEC has no jurisdiction to entertain or determine those issues.

The recommended exercise of preemptory authority is not supported by either the legal or factual record in this proceeding. Growth Management Act (GMA) established a "bottom-up" planning process that recognized the value of public participation and deferred to local jurisdiction decision making. Kittitas County afforded Sagebrush every opportunity to address issues and the applicant simply chose

to walk away. No continuing dialogue and no appeals. The circumstances certainly raise questions regarding motivations and minimal effort to "go through motions" in hopes that EFSEC would simply disregard the multi-year process followed by Kittitas County. That process must be respected. Preemption is an extraordinary remedy and should be exercised in only the rarest of cases. And this is not the case.

Applicant's request for preemption fails to meet the regulatory requirements established by WAC 463-28-040. Sagebrush has failed to establish any of the following matter: (1) demonstration of good faith toward resolution of noncompliance issues; (2) inability to reach agreement on issues resolution; and (3) the absence of alternative locations within the county. Kittitas County raised legitimate and substantial questions regarding development and mitigation. Sagebrush responded by not responding and taking a "take it or leave it position." All of the administrative review was in the context of local knowledge and the uncontroverted reality that a multitude of alternative sites were available for wind farm projects. Board of County Commissioners know both the people and land of their jurisdiction. They also understand the vision and plan for their community. This is a local decision and it should remain a local decision. It was the right project in the right location. This is the wrong project in the wrong location.

II. FACTUAL BACKGROUND

Sagebrush filed an Application for Site Certification ("ASC") with EFSECT on January 13, 2003. The original application proposed 121 turbines in a project area depicted on ASC Exhibit 1, Project Site Layout. Applicant subsequently revised the Project to reduce the number of turbines (although the actual number remained uncertain through the County process). The turbine strings remained the same and actual siting remained open with post-hearing "micro-siting" utilized for the actual locational decision making. While the proposal spoke in terms of 80 turbines, all analysis was based on 64-65 turbines. The total number and type of turbines remained an enigma throughout the local administrative process.

The project proposal was found to be inconsistent with Kittitas County Comprehensive Plan. "Inconsistency" relates to the County's wind farm ordinance which was established following public hearings and based on the successful process

developed for master planned resorts in the Trendwest development. Applicant now objects to the process despite the fact that it failed to appeal the legislative action. No challenge was made to the actual procedures during the administrative process and no appeal was filed with the Superior Court regarding the land use decision. EFSEC is not the proper forum to challenge the validity of the underlying ordinance or procedures.

EFSEC held a Land Use Consistency Hearing on May 1, 2003 in Ellensburg. It found that the land use proposal was not consistent with local land use ordinances and entered its order on May 7, 2003. Recognizing the EFSEC requirement, Applicant made application for change in, or permission under, such land use plans or zoning ordinances. Applicant first requested the County to separate the comprehensive plan and zoning process from the site specific permitting requirements. Ex. 20 (CT-T) at 11-12. The County rejected this proposal because it was inconsistent with adopted procedures. Again, no appeal was filed by Applicant.

Applicant then filed an application with Kittitas County pursuant to KCC 17.61A on March 27, 2003 ("First Application"). Sagebrush failed to provide and allow for appropriate environmental review of the project. The application process was suspended in order to pursue the Wild Horse Project. ROKT was led to believe that the Kittitas Valley Project would be dropped if the alternative site was permitted. ROKT did not register objections to Wild Horse project and Kittitas County found the alternative site to be a proper location with virtually no adverse off-site impacts.

Applicant initially filed a request for preemption with EFSEC on February 9, 2004. The preemption request was later withdrawn. In summer 2005 (more than two (2) years after the original application) Applicant purportedly revised the project proposal and filed a new application with Kittitas County. The EFSEC process was suspended pending the new application with the County. Both the County and EFSEC requested the Applicant to withdraw its request for preemption pending the outcome of the new County application. The Applicant withdrew its first request for preemption on October 19, 2005.

The County a Development Activities Application was filed on September 30, 2005. A revised application was filed October 14, 2005. The County deemed the application complete on October 17, 2005.[1]

Kittitas County held a public hearing before both the Planning Commission and the Board of County Commissioners ("BOCC") on January 10, 2006. Planning Commission unanimously recommended denial of the application. Subsequent hearings were conducted before the BOCC. Several continuances and extensions were granted to the Applicant in order to clarify the application; submit necessary materials; and/or respond to questions raised in the hearing process. The public participated and provided overwhelming input regarding the very significant impacts of siting this facility in a scenic area with a large number of impacted residences. Detailed exhibits, studies and information supplemented the public testimony.

Following hearings on January 10, January 11, and January 12, 2006, the Planning Commission held a deliberation on January 30, 2006 and issued a recommendation and findings of fact on February 13, 2006, recommending denial of the application. See Exhibit 2 attached to Applicant's Second Request for Preemption. The BOCC commenced "continued" hearings on March 29 and 30, 2006, with additional deliberations on April 12 and 27. Following Applicant's refusal to further participate and issuance of a "take it or leave it" ultimatum. BOCC issued a verbal decision on May 3, 2006 "preliminarily" denying the application. The denial was based on the BOCC's concern regarding a variety of locational considerations including visual impacts, shadow flicker, noise and impacts to scenic areas. While the BOCC preliminarily denied the Project due to the proximity of turbines to nonparticipating landowners, each County Commissioner offered varying opinions about reasonable and appropriate setbacks. Applicant was provided many additional opportunities to provide additional materials, data and information. The information was not provided. Following the BOCC's preliminary decision to deny the Project, Applicant also met with the County staff. The public was excluded from this dialogue.

[1] A county has twenty-eight (28) days in which to review an application for completeness. RCW 36.70B.070. Kittitas County expedited its review and issued the Notice of Completeness in three (3) days.

On May 31, 2006, the BOCC reviewed draft Findings of Fact and Conclusions of Law denying the Project. The BOCC formally identified reasonable setbacks from existing non-participating residences (2,500 feet) and nonparticipating owners' property lines (2,000 feet). Applicant advised the County that these setbacks would render the project economically unviable. No evidence or support was provided for the proposition. Only the assertion and position that Sagebrush would not offer alternatives. On June 6, 2006, by Resolution No. 2006-90, the BOCC denied the Project. No appeal was filed to the land use decision.

III. EFSEC HAS LIMITED AND CIRCUMSCRIBED AUTHORITY TO PREEMPT LOCAL ADOPTED COMPREHENSIVE PLANS, ZONING REGULATIONS AND PERMITTING DECISIONS

Sagebrush has petitioned EFSEC for preemption of local land use processes and determinations made by Kittitas County, Washington. Board of County Commissioners determined following a series of public hearings that the proposed wind energy resource facility was neither consistent nor compliant with local land use plans and regulations. EFSEC's preemptory authority is circumscribed and limited by statutory and regulatory directives.

The exercise of preemptory authority is not authorized in this proceeding. Sagebrush's petition should be denied for the following reasons: (1) the exercise of preemptory authority violates Growth Management Act (GMA); (2) EFSEC lacks jurisdiction to review and decide challenges to local land use procedures and decisions; and (3) Sagebrush has failed to establish the predicate basis for preemption under WAC 463-28-040.

3.1 Statutory and Regulatory Basis for the Exercise of Preemption Authority.

EFSEC has limited and circumscribed authority to preempt local determinations regarding the ". . . location, construction and operational conditions of certification of energy facilities." WAC 463-28-020. This authority does not extend to review of local ordinances and comprehensive plans for compliance with other statutory regimes. And it is not authority to replace or circumvent procedures for review of Land Use Decisions under LUPA (RCW 36.70C).

An applicant before EFSEC is required to take steps to resolve "inconsistency" with local land use plans and zoning ordinances. WAC 463-28-030(1) requires:

> As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.

EFSEC has made a prior determination of inconsistency in this proceeding. That conflict has not been resolved and Sagebrush is requesting the extraordinary remedy of preemption. WAC 463-28-040 requires that the following findings be made as a condition to the exercise of preemptory authority.

The request for preemption must address the following requirements:

(1) That the application has demonstrated a good faith effort to resolve the noncompliance issues.

(2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.

(3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.

(4) Interests of the state as delineated in RCW 80.50.010.

Horizon has failed to establish the predicate requirements for the exercise of preemption authority

3.2 Exercise of Preemptory Authority Violates Growth Management Act (GMA) and Deference Afforded Local Land Use Decision Making Processes.

Growth Management Act (GMA) specifically recognizes that ". . . .[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted. . . " pursuant to the GMA. RCW 36.70A.103. The sole exception is for ". . . other essential public facility" under RCW 36.70A.200. *Id.* A private wind energy project is not within the statutory definition of "essential public facility." RCW 36.70A.200(1). EFSEC is required to comply with the local requirements and processes.

(a) State Preemption of Energy Facility Siting, Construction and Operational Conditions Pursuant to RCW 80.50.110 and Growth Management Act (GMA).

In 1970, the Washington legislature passed the Thermal Power Plant Siting Act, Laws of 1970, 1st Ex.Sess., ch. 45, §11, which was codified at RCW chapter 80.50. In 1976, the act was expanded to encompass the siting of other energy facilities in addition to thermal power plants. Laws of 1975-76, 2d Ex.Sess., ch. 108 (codified at RCW 80.50.010(7), (10), (14)). "Alternative energy resource" includes wind and solar energy facilities. RCW 80.50.010(17).

The purpose of the act was to develop a single, streamlined procedure for the selection and use of sites for energy facilities and the identification of the State's position with respect to each proposed site. RCW 80.50.010. The authority of the state to approve – through the certification process – the siting, construction and operational conditions of energy facilities is set forth in RCW 80.50.110, which provides:

> (1) If any provision of this chapter is in conflict with any other provisions, limitation, or restriction *which is now in effect* under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.
>
> (2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the *energy facilities* included under RCW 80.50.060 as now or hereafter amended.

(Italics added). EFSEC authority includes the construction, reconstruction or enlargement of energy facilities that "exclusively use alternative energy resources." RCW 80.50.060(2).

The operative language of RCW 80.50.110 provides that the preemption authority is available only to those provisions which are "in effect" on the effective date of RCW 80.50.110. Growth Management Act (GMA) was not in effect on the effective date of RCW 80.50.110. The statutory scheme clearly recognized the retained legislative authority to enact statutes and legislation in the future which would more specifically govern local land use planning. State of Washington exercised this

reserved authority with the adoption of Growth Management Act (GMA). It must take priority.

GMA was designed to establish a comprehensive and integrated land use planning process that was built upon public participation and local decision making. RCW 36.70.010. In 2002, the Legislature passed Engrossed Substitute Senate Bill 6594 amending RCW 36.70A.103, which required all state agencies to comply with local comprehensive plans and development regulations. RCW 36.70A.103 states:

> State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250 (1) through (3), 71.09.342, and 72.09.333.
>
> The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

Through this same bill (ESSB 6594) the Legislature amended RCW 36.70A.200. The actual text of section 2 of ESSB 6594 reads:

> " **Sec. 2.** RCW 36.70A.200 and 2001 2nd sp.sess. c 12 s 205 are each amended to read as follows:
>
> (1) The comprehensive plan of each county and city that is planning under RCW 36.70A.040 shall include a process for identifying and siting essential public facilities. Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.
>
> (2) Each county and city planning under RCW 36.70A.040 shall, not later than September 1, 2002, establish a process, or amend its existing process, for identifying and siting essential public facilities and adopt or amend its development regulations as necessary to provide for the siting of secure community transition

facilities consistent with statutory requirements applicable to these facilities.

(3) Any city or county not planning under RCW 36.70A.040 shall, not later than September 1, 2002, establish a process for siting secure community transition facilities and adopt or amend its development regulations as necessary to provide for the siting of such facilities consistent with statutory requirements applicable to these facilities.

(4) The office of financial management shall maintain a list of those essential state public facilities that are required or likely to be built within the next six years. The office of financial management may at any time add facilities to the list.

(5) No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

(6) No person may bring a cause of action for civil damages based on the good faith actions of any county or city to provide for the siting of secure community transition facilities in accordance with this section and with the requirements of chapter 12, Laws of 2001 2nd sp. sess. For purposes of this subsection, "person" includes, but is not limited to, any individual, agency as defined in RCW 42.17.020, corporation, partnership, association, and limited liability entity.

(7) Counties or cities siting facilities pursuant to subsection (2) or (3) of this section shall comply with section 7 of this act.

(8) The failure of a county or city to act by the deadlines established in subsections (2) and (3) of this section is not:

(a) A condition that would disqualify the county or city for grants, loans, or pledges under RCW 43.155.070 or 70.146.070;

(b) A consideration for grants or loans provided under RCW 43.17.250(2); or

(c) A basis for any petition under RCW 36.70A.280 or for any private cause of action. "

Subsection 1 of this section was not amended. Essential public facilities include facilities that are typically difficult to site but does not include alternative energy resource facilities. The "state's authority" to site essential public facilities does not extend to wind farm uses. A local jurisdiction's comprehensive plan and

development regulations govern the siting of public facilities, which are not included in the category of "essential public facilities." EFSEC enjoys no exemption from GMA as it relates to wind energy resources and preemptory powers limited by the subsequently enacted legislation.

(b) Sagebrush's Reliance on HB 2402 is Misplaced and Without Statutory or Judicial Authority.

The siting of alternative energy resource facilities is not automatically subject to the jurisdiction of EFSEC. Energy facility developers may apply for either (1) local jurisdiction permitting, or (2) EFSEC certification under the provisions of RCW 80.50.060(2). Either process requires as a predicate consistency with local land use plans and regulations. Sagebrush filed a site certification application with EFSEC on January 13, 2003. More than two (2) years later, Applicant has file with EFSEC a Request for Preemption pursuant to WAC 463-28-040.

EFSEC's statutory preemption authority has existed for 30 years. This authority, however, did not extend to preemption of comprehensive plans and development regulations adopted under GMA. In the 2006 session, the legislature amended RCW 80.50.020(15) and (16), and added references to comprehensive plans and zoning ordinances adopted under the GMA. HB 2402, 59th Leg. (2006). Sagebrush asserts that this legislation confirms the implicit prior understandings that GMA based plans and zoning were subject to EFSEC's preemptive authority. No legislative history or judicial authority is provided to support this proposition.

HB 2402 became effective on June 7, 2006. On that date, EFSEC has already received the Applicant's application. The statute only applies prospectively, and is not applicable to the permit presently under consideration. Generally, a statutory amendment is like any other statute and applies prospectively only. *In re Detention of Brooks, 145 Wash.2d 275, 284, 36 P.3d 1034 (2001).* In Washington when a statue is silent on whether it applies retroactively or prospectively the presumption is that the statue is applied on a prospective basis. In re *Personal Restraint of Stewart*, 115 Wn.App. 319, 75 P.3d 521 (2003), *State v. Smith* 144 Wn.2d 665, 673, 30 P.3d 1245 (2001); *Robin Miller Construction Co. Inc. v. Coltram*, 110 Wn.App. 883, 890 43 P.3d (2002). The presumption against retroactive application of a statute or amendment is an

essential thread in the mantle of protection that the law affords the individual citizen. The rule is practical and fair. All parties know the rules at time of application and the decision making process cannot be derailed by ever changing legislation.

The strong presumption that an amendment is prospective can be overcome only if it is shown that (1) the legislature intended the amendment to apply retroactively, (2) the amendment is curative, or (3) the amendment is remedial. *Id; see also, McGee Guest Home, Inc. v. Dep't of Social and Health Services, 142 Wash.2d 316, 324, 12 P.3d 144 (2000); State v. Cruz, 139 Wash.2d 186, 191, 985 P.2d 384 (1999); In re F.D. Processing, Inc., 119 Wash.2d 452, 460, 832 P.2d 1303 (1992).* None of the identified circumstances exist in this case. HB 2402 simply modified certain definitions contained within chapter 80.50 RCW. Implicit in the amendment is the clear implications that prior applications were subject to GMA. The amendment is neither curative, nor remedial. And there is no statement that it is to be applied retroactively.

Second, Judge Torem, during Intervener Lathrop's cross examination of Mr. Wagoner, specifically applied a prior version of WAC 463-42-362 to which the Applicant did not object. In doing so Judge Torem referenced and indicated the applicant was vested to the statues and Washington Administrative Code provisions ("Rules") in place when the application was filed. (see generally Adjudicative Hearing Transcript pages 375-376.) That determination must apply for all purposes.

Third, HB 2402 did not make it "explicit" that EFSEC had the authority to Preempt GMA based development regulations. HB 2402 did nothing to resolve the inherent conflict between RCW 36.70A.200, RCW 36.70A.103 and RCW 80.50.110.

(c) Sagebrush Misstates and Misapplies the Judicial Determination in *Lathrop v. EFSEC.*

Sagebrush makes the hollow argument that the appellate court in *Lathrop v. EFSEC,* 130 Wn.App. 147, 121 P.3d 774 (2005) confirmed preemptive jurisdiction by EFSEC. The court of appeals addressed only the single issue of superior court jurisdiction to review interlocutory decisions issued by EFSEC. It did not decide any issue regarding preemptive authority.

Sagebrush cites the following language from the case:

> In chapter 80.50 RCW, our legislature set out an expedited administrative procedure to consider energy facility site applications. The procedure is designed to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). EFSEC conducts administrative hearings on proposed energy facility sites and reports to the governor a recommendation on the disposition of applications for site approval and submission of a "draft certification agreement" when the EFSEC recommends approval. RCW 80.50.040(7), (8). While EFSEC may recommend preemption solely the governor has the power to preempt of land use plans under the statutory scheme.

130 Wn.App. at 151.[2] The court found that the statutory regimen vested ". . . authority solely in Thurston County Superior Court to sort through interlocutory decisions. . . ." 130 Wn.App. at 152. The review of preemption by the courts is made after the governor's decision.

The Washington legislature delegated to the Department of Community Trade and Economic Development ("CTED" or the "Department") authority to promulgate guiding regulations for implementing the GMA. WAC 365-195-020. The Department's GMA regulations at WAC chapter 365-195 evidence its acknowledgment of state preemption of energy facility siting decisions and shed light on the requirement in RCW 36.70A.103 that state agencies comply with the GMA.

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[2] The issue is whether the court erred in dismissing Mr. Lathrop's petition for review and concluding it lacked subject matter jurisdiction and statutory authority under chapter 80.50 RCW to act on the petition.

When interpreting a statute, our duty is to discern and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We give effect to the plain meaning. *McGinnis v. State,* 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). We construe statutes to avoid strained or absurd results. *Strain v. W. Travel, Inc.,* 117 Wn.App. 251, 254, 70 P.3d 158 (2003), review denied, 150 Wn.2d 1029 (2004).

In chapter 80.50 RCW, our legislature set out an expedited administrative procedure to consider energy facility site applications. The procedure is designed to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). EFSEC conducts administrative hearings on proposed energy facility sites and reports to the governor a recommendation on the disposition of applications for site approval and submissions of a "draft certification agreement" when the EFSEC recommends approval. RCW 80.50.040(7), (8). While EFSEC may recommend preemption, solely the governor has the power to preempt of land use plans under the statutory scheme.

The expedited procedure requires EFSEC to report its recommendation within 12 months of receipt of an application. RCW 80.50.100(1). Within the next 60 days, the governor must make a decision to approve or reject the application or ask EFSEC to reconsider aspects of the draft certification agreement. RCW 80.50.100(1)(a)-(c). "The rejection of an application for certification by the governor shall be final as to that application." RCW 80.50.100(3). *Id.* At 150-151.

(d) WAC 365-195-745 Does Not Supersede Local Land Use Plans and Zoning Codes.

Sagebrush argues that WAC 365-195-745 directs that local comprehensive plans and zoning regulations are subordinate to EFSEC authority. A simple reading of the regulation belies this notion. WAC 365-195-745 provides that plans and regulations adopted under the GMA "should accommodate situations *where the state has explicitly preempted all local land use regulations, as for example, in the siting of major energy facilities* under RCW 80.50.110."

This regulation neither acknowledges the state's primary role in energy facility siting nor provides that local land use laws are subordinate to state regulation. It simply recognizes that local jurisdictions must "accommodate" the siting of major energy facilities. Kittitas County has "accommodated" the siting of major energy facilities by providing a regulatory process that allows for the consideration of such facilities in a variety of locations. A local jurisdiction is not precluded from reviewing each application and assessing impacts, mitigation, and locational factors of a proposed facility. It is clear that Kittitas County has accommodated such uses – just not in this particular location. Wild Horse was approved and many other suitable locations are available. Sagebrush seems to suggest that a wind farm can and should be allowed at any location.

Sagebrush argues that CTED has interpreted and limited the scope of RCW 36.70A.103. WAC 365-195-765(2) provides, in part, as follows:

> . . . construes the provision for state agency compliance to require that each state agency must meet local siting and building requirements *when it occupies the position of any applicant* proposing development. . . . *Generally this means that the development of state facilities is subject to local approval* procedures and substantive provisions[.]

WAC 365-195-765(2) (emphasis added). The regulatory reference simply recognizes that, "generally", a state agency must comply with local regulations. WAC 365-195*765(4) further recognizes "that all programs at the state level accommodate the outcomes of the growth management process *wherever possible."* EFSEC must accommodate the local planning process. This regulation recognizes the fundamental

promise that state agencies (including EFSEC) must comply with local comprehensive plans and development regulations. The regulations establish that "all programs at the state level" must comply with local comprehensive plans and development regulations. WAC 365-195-765.[3]

(e) Rules of Statutory Construction Regarding Conflicting Statutes Militate in Favor of the Pervasive Authority Under Growth Management Act (GMA).

Under Washington's principles of statutory construction, the statutory provision that appears latest in order of position (i.e., the most recently enacted provision) prevails unless the first provision is more clear and explicit than the last. *State v. J.P.,* 149 Wn.2d 444, 69 P.3d 318 (2003). Growth Management Act (GMA) is the most recent legislation and the intent is clear that ". . . it is in the public interest that citizens, communities, local governments, and the private sector corporate and coordinate with one another in comprehensive land use planning." RCW 36.70A.010. Kittitas County followed this mandate. Growth Management Act (GMA) ". . . evinces the legislature's intent to discard the traditional land use system. . . . in favor of a scheme which stresses coordination, cooperation, and integration." *City of Des Moines v. Central Puget Sound Growth Management Hearings Board,* 97 Wn.App. 920, 929, 988 P.2d 993 (1999).

Growth Management Act (GMA) amendments have clearly recognized the primacy of local decision making and mandated deference to the decision making process. RCW 36.70A.3201. A broad range of discretion is afforded to local jurisdictions and such deference ". . . supersedes deference granted by the APA and courts to administrative bodies in general. *Quadrant Corporation v. State Growth Management Hearings Board,* 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). EFSEC must defer to local decision makers in matters of local land use planning and decisions.

Requiring project approval at the county level is consistent with the purpose of the EFSEC statute and regulatory guidelines. Contrary to Sagebrush's

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[3] The Department's interpretation is supported by analogous case law regarding the duty of special districts, such as ports, to comply with the GMA when the special district itself is the applicant proposing development. See, *City of Des Moines v. Puget Sound Reg'l Council,* 98 Wn.App. 23, 29-30, 988 P.2d 27 (1999) (Port of Seattle would be obliged to comply with terms of city comprehensive plan if city were engaged in cooperative planning process required by GMA).

argument, an applicant must make and process an application with local jurisdictions ". . . for permission under . . . land use plans and zoning ordinances . . .." WAC 463-28-030(1). A statutory provision may not be read in a manner that will "render another provision inoperative." *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission,* 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

Sagebrush's argument would result in the total elimination of Growth Management Act (GMA) planning processes. This was certainly not contemplated by the legislature.

3.3 The Wind Farm Overlay Ordinance is a Valid and Established Procedure Under Growth Management Act (GMA).

Sagebrush challenges the validity of the Kittitas County Wind Farm Overlay Ordinance ("WFRO") and the procedural processes followed in the administrative hearings. EFSEC has no authority to review these issues.

(a) Sagebrush Failed to Challenge Plan Procedures and Decisions and Is Precluded from Collateral Challenges to Comprehensive Plan and Ordinances.

The Growth Management Act (GMA) requires local governments to adopt comprehensive plans and implement development regulations under the GMA, to meet the 13 statewide planning goals and other requirements. Once development regulations are enacted, the law does nothing to change the circumstances of enforcement of those development regulations. Kittitas County followed the statutory directives and adopted its Wind Farm Resource Overlay Ordinance ("WFRO") together with implementing development regulations. No appeals were filed and the legislation is valid and not subject to collateral attack. *Wenatchee Sportsmen Association v. Chelan County,* 141 Wn.2d 169, 4 P.3d 123 (2000). Sagebrush failed to exhaust administrative remedies (i.e., failed to appeal) and is barred from making a challenge in this proceeding. *Peste v. Mason County,* 133 Wn.App. 456, 467, 136 P.3d 140 (2006).

Under the GMA, local comprehensive plans are the foundation to all land use regulations and permitting. "A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan." RCW 36.70.020. . ." RCW 36.70A.030(7), RCW 36.70B.020(4) defines "project

permit" or "project permit application" to mean "any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, . . . site specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations."

In the Wind Farm Resource Overlay Ordinance, KCC 17.61A (the "WFRO"), wind energy facilities are considered eligible for approval as an "overlay" use within the County's Forest & Range ("FR") and Agricultural-20 ("A-20") zones. A significant portion of Kittitas County falls within these zoning districts. Sagebrush's application involves property in the proper zones and is subject to the ordinance provisions.

Kittitas County has established that the identified zoning districts are available for consideration for development of wind energy facilities. The overlay determination, however, requires a site specific review following a public process. Not every location is suitable for a wind energy facility. Contrary to Sagebrush's argument (Sagebrush Opening Brief), Kittitas County has followed a virtually identical procedure for large or unique projects such as Master Planned Resorts. The experience from other applications had proven successful and rationally related to anticipated wind farm development.

In accordance with the WFRO, the County requires that the project site plan be approved as a "subarea plan," amending the Comprehensive Plan. The subarea plan must be reviewed and considered in concert with a site specific rezone, a development agreement and wind farm permit. It is common in Eastern Washington to combine comprehensive plan amendments with a rezone and development agreement. Chelan and Yakima counties follow the same procedures. The purpose of consolidation is to streamline the administrative process. It is odd that Sagebrush is complaining about this procedural element.

Sagebrush has challenged the structure of the Wind Farm Resource Ordinance and offered the opinions of Roger Wagoner (Ex. 41R Sup (RW-R Sup)). That challenge is not within the jurisdiction of EFSEC. It is also clear that Mr. Wagoner is unfamiliar with the fact that the same procedure was validated on appeal in

the case of *Ridge v. Kittitas county,* ("Trendwest") in both Yakima County Superior Court and the Eastern Washington Growth Management Hearings Board. The procedure is both valid and appropriate – Sagebrush simply did not like the result of the process.

Mr. Wagoner also offered his opinion as to whether the County's determination in this proceeding is consistent with the adopted comprehensive plan and supported by substantial evidence. Review of these determinations is within the exclusive jurisdiction of the superior court pursuant to Land Use Petition Act (LUPA). RCW 36.70C.130(1)(a), (b) and (c). A failure to appeal the underlying land use decision results in the automatic validation of the action and determinations. *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005); and *Chelan County v. Nykreim,* 146 Wn.2d 904, 925, 52 P.3d 1 (2002). The determinations made by Board of County Commissioners are verities on appeal and binding in this proceeding.

Sagebrush next argues that by combining that legislative process with quasi judicial development permitting, the County created an irreconcilable inconsistency between the adjudicatory process for quasi judicial development permits and the adoption of comprehensive plan amendments and development regulations. (Sagebrush Opening Brief – 44-45). It was argued that this process failed to comply with RCW 36.70A.040(4), requiring development regulations to be consistent with and implement the comprehensive plan; RCW 36.70A.070, requiring the comprehensive plan to be an internally consistent document; and RCW 36.70A.070 and 36.70B.030, requiring that development permits be based on the legislative adopted planning and zoning documents.[4] This argument fails for a number of reasons. First, Sagebrush

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[4] RCW 36.70B.020(4) explicitly distinguishes between "permits" and legislative processes. "Project permits" are defined as

> any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.

failed to appeal the adoption KCC Ch. 17.61A and is precluded from collaterally attacking the ordinance. *Woods v. Kittitas County,* 130 Wn.App. 573, 582-3, 123 P.3d 883 (2005); and *Somers v. Skagit County,* 105 Wn.App. 937, 939, 21 P.3d 1165 (2001). Second, the process assures consistency between the comprehensive plan overlay designation and zoning by addressing the issues on a combined basis. Third, the asserted inconsistency with GMA procedures should have been raised by appeal to Growth Management Hearings Board (Sagebrush Opening Brief – 44-45). Finally, the Applicant misstates the holding in *Wristen-Mooney v. Lewis County,* WWGMHB Case No. 05-2-0020, Final Decision and Order (March 27, 2006). The board held that ". . . the Petitioners have not demonstrated that this combined process fails to comply with the GMA for either fully contained communities or master planned resorts." The combined process is a valid procedure that is not subject to review in this proceeding.

(b) Sagebrush's Argument That the Wind Farm Ordinance, as Adopted and a Applied to the KV Project, Violates the Regulatory Reform Act is Without Legal Merit and EFSEC Has No Jurisdiction to Make Such Determination.

As with arguments related to GMA compliance, Sagebrush again requests EFSEC to overstep its legal authority and determine the legality of Kittitas County ordinance and procedures in the context of Regulatory Reform Act (RCW Ch. 36.70B). (Sagebrush Opening Brief 45-46). EFSEC does not have jurisdiction or authority to make such determination. RCW 80.50.040. An agency or tribunal's authority may not be expanded beyond the scope of the legislative authorization.

Sagebrush argues that Kittitas County failed to comply with RCW 36.70B.020(3) by conducting more than one "open record public meeting." (Sagebrush Opening Brief 47-48). As a beginning proposition, the statutory requirement does not apply to the WFRO process. A "project permit application" does not include ". . . the adoption or amendment of a comprehensive plan's subarea plan or development regulations. . . ." RCW 36.70B.020(4). There is no valid legal authority to support the proposition offered by Sagebrush in this proceeding. Regulatory Reform Act does not apply to the Sagebrush application.

(c) Kittitas County's Use of Development Agreements in the Wind Farm Ordinance is Authorized by RCW 36.70B.170 - .210.

The GMA specifically authorizes local governments enter into development agreements with property owners confirm and vest development standards and conditions for a project. RCW 36.70B.170 provides a list of "development standards that can be included in a development agreement." "A development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement." RCW 36.70B.170(1).

Contrary to the assertion made by Sagebrush, the adoption of a development is not a "negotiation." Sagebrush Opening Brief – 55-60. A development agreement may only be adopted at a "public hearing" with proper notice and public participation. The County's wind farm ordinance "requires" a development "agreement." This requirement is based on the successful approach taken in the Trendwest Master Planned Resort proceeding.

The legislative intent regarding development agreements is codified, and included as an endnote to RCW 36.70B.170:

> **Findings – Intent – 1995c 347 §§502-506:** The legislature finds that the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate housing costs for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public. Assurances to a development project applicant that upon government approval the project may proceed in accordance with existing policies and regulations, and subject to conditions of approval, all as set forth in a development agreement, will strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development. Further, the lack of public facilities and services is a serious impediment to development of new housing and commercial uses. Project applicants and local governments may include provisions and agreements whereby applicants are reimbursed over time for financing public facilities. *It is the intent of the legislature by RCW 36.70B.170 through 36.70B.210 to allow local governments and owners and developers*

of real property to enter into development agreements. [1995 c 347 § 501].

Sagebrush criticizes the process because review of a development agreement is included in the consolidated process. Mr. Wagoner testified that in his experience ". . . development agreements between local governments and project properties are the last step of the permitting process." EX. 41 R SUP (RW-R SUP) at 12. It is apparent that Mr. Wagoner's experience did not include the highly successful Trendwest project. Kittitas County's work in Trendwest - and in particular the development agreement – became the model for large project permitting processes in this state.

Sagebrush next argues that the County abused its legislative authorization related to development agreements. It is contended that Horizon had no meaningful opportunity to "negotiate" with either the staff or with the BOCC. Sagebrush Opening Brief – 57. Application and permit processing is not a "negotiation". It is a public process. Decisions and elements of a development agreement are appropriate only after public hearings. The public is a proper party to the process and Sagebrush's misplaced logic would eliminate that participant from the procedure. Also, if Sagebrush felt that there were procedural errors, the available recourse was to appeal the decision under Land Use Petition Act (LUPA). RCW 36.70C.130(a)(1). They chose not to appeal and EFSEC has no authority to supplant the judicial system in review of the local land use decision.

Sagebrush finally argues that the BOCC refused to delegate any authority to professional planning staff to negotiate terms of the development agreement. Sagebrush Opening Brief – 58-49. BOCC has no legal authority to delegate either negotiation or decisions on a development agreement. RCW 36.70B.200. The decision can only be made following a "public hearing" by BOCC. Sagebrush offers no legal authority in support of this proposition.

3.4 Sagebrush Has Failed to Establish Necessary Requirements of WAC 463-28-040.

WAC 463-28-040 requires that an applicant establish the following four (4) factors as a predicate to the exercise of preemptive authority: (1) demonstration of

good faith effort to resolve noncompliance issues; (2) inability to reach resolution on noncompliance issues; (3) a review and finding that alternate locations are not available within the County; and (4) the interests of the state as set forth in RCW 80.50.010. Sagebrush has failed to establish the requisite foundation for preemption.

(a) Applicant Has Failed to Meet Its Burden to Prove it Made a Good Faith Effort to Resolve the Inconsistency.

The first requirement of preemption is that the Applicant demonstrates a good faith effort to resolve the non-compliance issues with Kittitas County. WAC 463-28-040(1). Applicant has attempted to paint a picture that it did everything humanly possible to address vague and conflicting requests from the County and a hopelessly flawed public process. A careful review of the record is helpful in separating fact from fiction. The true fact is that the County bent over backward to accommodate this applicant.

Kittitas County granted opportunity after opportunity through at least six (6) hearings and were left with Sagebrush's "take it or leave it" demand. Good faith does not mean that the County must accept only an applicant's conditions and neglect or disregard the legitimate interests of neighboring property owners or the general public. And it does not mean that the County discards sound planning consideration in order to make the project "economically viable" for the developer.

The best and most accurate way for the Council to weigh the Applicant's good faith efforts is through a full reading of the Verbatim Transcript of Proceedings of April 12 and 27, May 3 and 31, and June 6, 2006. For it is not the arguments of the parties or their self-serving statements or conclusions that are determinative of the issue--it is the record. We will focus on a portion of the record to highlight critical elements an factors. It must be remembered that both Kittitas County Planning Commission and Board of County Commissioners found this proposal to be an unacceptable application. These same bodies had earlier approved a wind project – Wild Horse – where land use conflicts were not present.

(i) Board of County Commissioners

Kittitas County Commissioner Huston is experienced in land use and comprehensive planning matters. He was also a key figure in the Trendwest

development process and was intimately involved with design and adoption of the wind resource overlay ordinance. Commissioner Huston noted that Sagebrush had chosen an area of the Kittitas Valley that had been designated "Rural" and had potential for higher levels of residential development. He then posed the question: was there adequate justification of public benefit to find the project consistent with County goals and policies? (*see* Verbatim Transcript of Proceedings, April 12, 2006, Pages 7-11) The issue was properly framed for the applicant.

Commissioner Huston then noted that the Development Agreement previously adopted for the Wild Horse Project would serve as the template for the Kittitas Valley Project. It was noted that there were significant differences between the two sites; Kittitas Valley (like enXco's Desert Claim application) was situated in the vicinity of significant existing and potential residential development; and scenic corridors were impacted. As of April 12, 2006, and after seven (7) prior public hearings, Sagebrush responded with a draft Development Agreement that did little more than change the name from Wild Horse to Kittitas Valley. This was obviously the case as it contained numerous provisions that related only to the Wild Horse Project. (*See* Verbatim Transcript of Proceedings, April 12, 2006, Pages 12-16) The Development Agreement is the "heart and soul of the mitigations of the impacts" and Commissioner Huston found the current draft of the Development Agreement particularly lacking in this regard. (*see* Verbatim Transcript of Proceedings, April 12, 2006, Page 17). It was the applicant's obligation to prepare and submit the Development Agreement.

With regard to setbacks, Commissioner Huston pointed out the very clear distinctions between the Wild Horse Project and the Kittitas Valley Project. Wild Horse did not present serious impacts on adjoining properties because there were literally no adjoining properties. Kittitas Valley presented an entirely different situation. *Id.* at 25.

The potential for impact was recognized by the applicant. Shadow flicker, noise and lights were identified in the Development Agreement--even as proposed by the Applicant. The public responded to the deficiencies and lack of mitigation. The only mitigation proposed by Sagebrush was to establish an inadequate setback of 1000 feet. *Id.* at 26-28 and 43. Not until the Applicant got to EFSEC did it

suggest it could use technology to shut turbines off during periods when significant shadow flicker impacted residences. (Adjudicative Hearing Transcript of Proceedings, page 782-786) A good faith approach would have incorporated the mitigation in the proposal.

It was even difficult during the proceeding to ascertain the scope of the proposal. Sagebrush had not presented a proposed Development Agreement that clearly specified the number, location or size of the towers. *Id.* at 41-45. Commissioner Bowen noted the zoning district height restrictions and the significant impacts associated with structure height, location and density. The turbine proposal was for larger machines with no micro-siting at the time of the application. The impacts on surrounding property and character of existing zoning was noted.

Commissioner Bowen also noted that, while the Applicant had apparently reduced the number of turbines over-all, many of the reductions took place in the center of the project as opposed to tower locations closer to the project boundaries. Thus, the reduction provided little in the way of mitigation. *Id.* at 47-48. He noted that the DEIS analyzed setbacks from 0.4 to 1.5 miles but that the Development Agreement as proposed by the Applicant proposed no such distances in the way of mitigation or that the acknowledged impacts would be mitigated by the 1000 foot setback that was proposed by the Applicant. *Id.* at 48-51.

At the conclusion of that hearing, the Commissioners requested the Applicant to bring them information on setbacks that would mitigate uncontroverted impacts and to revise the draft Development Agreement so that it actually addressed the specifics of the Kittitas Valley Project. Board of County Commissioners' clearly expressed mitigation requirements. Commissioners even elected to visit other wind resource projects in order to evaluate impacts and mitigation measures. Sagebrush seemed to recognize the need for reasonable setbacks and it was expressed that Sagebrush did not see any "deal killers" and that all parties were negotiating together in good faith. *Id.* at 53-57.

Commissioner Huston was specifically concerned about the setback. He stated "I'm looking for the Applicant to actually present additional information to suggest a setback from their perspective, mitigates the impacts that they

have agreed exist." *Id.* at 62. It was incumbent on the applicant to support its position – Commissioner Huston went on to state:

> "I think in terms of what I'm looking for, I think I've been fairly clear about what I'm dealing with is, frankly, the question of an identified probable significant adverse impact which I must mitigate.
>
> And just to be clear for the record, I'm not prepared to walk away from that as just an acceptable impact and one that's not – that we're not able to mitigate. I don't believe that's the case. I need to mitigate that impact before I can determine that in fact this project's public benefit outweighs the negative impact. So in a nutshell that's it."

Id. at 64. An Applicant has the burden of proof to support a request for amendment of the comprehensive plan and rezone of the property. A particular concern related to the location of the proposal and proximity to established residential areas.

Finally, Commissioner Huston makes a very key statement that shows complete and accurate comprehension of the very same issues presented to EFSEC: "I'm not prepared to accept the global notions that power generation is a public benefit; I'll just accept that, that's fine. But we're dealing with the question of this project generating power. Because as we've already indicated with past decisions, there are other sites at which wind farms can be placed. ... The question is in this site. Can the benefits that it will generate, can they be made to outweigh the impacts that they cause? Question of mitigation." (emphasis added) *Id.* at 64-65. The approved site was Wild Horse and concerns did not relate to the value of wind power generation but the locational choice.

The directions were clear – address the setback issue and support the request with date on shadow flicker, lights, noise and the imposition of very large structures into an area already settled with residences.

(ii) Board of County Commissioners Hearing on April 27, 2006.

Board of County Commissioners reported the results of their independent site visits to other wind farms. County Planning Staff supplemented the record with correspondence from Applicant responding to a number of issues raised by BOCC during the April 12 public hearing. (*see* Verbatim Transcript of Proceedings,

April 27, 2006, Pages 1-15) Staff also indicated that elements set forth within the decision making matrix previously provided to the Applicant had not been introduced and thus were not in the record. (*see* Verbatim Transcript of Proceedings, April 27, 2006, Pages 16-17) Counsel for the Applicant then made a presentation but did not present an updated draft Development Agreement.

At this point Commissioner Huston stated the obvious: "The biggest concern that I have is at this point is that I don't have what I asked for, which was a current, updated draft of the Development Agreement. I have a letter that certainly explains why I'm wrong on a couple of points and – and tells me the things you probably would include in a new draft Development Agreement, but that's not exactly the same thing." *Id.* at 25-26. The Commissioners' request was then restated: "I want a new, clean Development Agreement that representatives of Horizon are prepared to stand in front of me and say, we will do everything, everything without exception that is in this draft. Not promise that you'll talk about doing some things in the future. Tell me what you are prepared to do, should that Development Agreement be signed." *Id.* at 28. Commissioner Crankovich concurred, and they each restated their positions on the point. *Id.* at 29-31. The Applicant's counsel indicated a continued willingness to work on Development Agreement issues (*Id.* at 32-33). Horizon was given a third opportunity to provide the revised Development Agreement. The public was becoming frustrated with the lack of progress and obvious reluctance of the Applicant to be responsive and submit necessary information.

Board of County Commissioners allowed another extension and reiterated the need for a revised Development Agreement and provision of data on setback distances that would adequately mitigate all of the acknowledged impacts the project would have to the surrounding neighborhood.

(iii) Board of County Commissioners Hearing of May 3, 2006.

It is at this hearing that the tenor of the Applicant's posture with the County was decidedly different. Prior assurances were replaced with defiance and a continued lack of material information. Chance after change had been given with no meaningful response.

Commissioner Bowen opened the hearing by acknowledging receipt of a draft Development Agreement dated May 1, 2006. The draft was not provided in a timely manner and the public precluded from meaningful opportunity to review and comment on the revised document. Applicant also submitted supplemental correspondence suggesting that the County was unreasonably delaying the process and not acting in good faith. (*see* Verbatim Transcript of Proceedings, May 3, 2006, Pages 5-6) A history was recited by Commissioner Bowen. *Id.* at 6-10. Each of the County Commissioners discussed the evidence in the record and their individual wind farm site visits with particular focus on the issue of setbacks and mitigation measures. It is interesting to note that each Board Member independently reached a similar conclusion – that mitigation of impacts would reasonably require a setback of between 2,000 feet and one-half mile to adequately mitigate all impacts on the KV Project site. A distance of 3,000 feet from non-participating lands and residences was viewed as a reasonable target. *Id.* at 10-15, 21-24, 26-29.

County Staff then provided its critique of the most recent draft Development Agreement and reiterated its concern about new information being placed in the record by the Applicant. *Id.* at 16-18, 31-45. The public was being foreclosed from meaningful participation.

Following a break during the proceeding, BOCC asked the Applicant to specifically address the Commissioners' questions and issues. It should be emphasized at this point that the most current draft Development Agreement proposed to increase the setback from 1000 feet to 1350 feet from existing residences. No information or data was presented to support the proposal.

Applicant's representative, Chris Taylor, advised the Board that Sagebrush had provided adequate responses and "as a representative of the Applicant and on behalf of Applicant Power Partners and its parent company Horizon Wind Energy, I must inform you that at the proposed setback of 2500 feet, as I – if I've understood correctly the proposal from the Board, would, in our opinion, render this project inviable." [sic] *Id.* at 47. No information or analysis was provided to support this proposition. It should also be noted that the setback problem was created by

Sagebrush's decision to develop in proximity to existing residences. Many other areas were available without such limitations.

BOCC stated that the Applicant had failed to provide information to substantiate that the project was economically viable with setbacks of 1350 feet but not at any greater distance. Applicant could not (or would not) identify any part of the record to support any assertion on economic viability. *Id.* at 47-50. A 2500 foot setback was certainly capable of being accomplished from a site development perspective. Without elaboration, the Applicant's counsel said the Applicant would not go forward with 2500 foot setbacks and that the Commissioners should take whatever action they choose. *Id.* at 49.

The following exchange then took place regarding the status of the record:

> COMMISSIONER HUSTON: I think it's important to note for the record, Mr. Chairman, that through this entire process we've had continuous notation in terms of the items in the record. We now have an assertion by the proponent, who's essentially tossed their hands up and said, It's not viable.
>
> I guess at this point – frankly I'm a bit disappointed that after all this time and effort and months of discussion, they're not even prepared to offer into the record – we've already discussed the need to throw this back open for comment. *They're not even prepared to discuss in fact why it's not viable, what constitutes an economically viable project, or anything in the record to substantiate what has been a last-minute assertion that apparently there is a magical number of towers that makes a project viable.*
>
> I'm hearing nothing to support that assertion, nothing whatsoever, other than I guess they don't want to play anymore. *And I think it's important when this record goes to EFSEC that after a great deal of deliberation, a great deal of discussion, a great deal of effort on the part of a number of citizens, as well as staff and the Board of County Commissioners of Kittitas County, we're now at a point where essentially the hands have gone up and I guess the discussion is over.*
>
> And frankly, I'm not absolutely sure why we can't get a more definitive statement from the Applicant,

> although I suspect I know why; it'll play much better in front of EFSEC.
>
> If in fact this is your last and best effort, Applicant, come to the microphone and tell me that the draft I have dated May 1, 2006, is the absolute final and best offer of the Applicant, and then I guess I'll base my decision on that.
>
> CHAIRMAN BOWEN: We should note for the record the Applicant doesn't wish to reply to that statement.
>
> COMMISSIONER HUSTON: Well, then, we'll note for the record that they do not wish to indicate whether in fact this is their best offer; and I guess we'll then have to make our decision in essentially a vacuum at this point. I would note for the record the Applicant has chosen to no longer participate in the process in a meaningful manner.

Id. at 50-52. Sagebrush's actions (or lack thereof) were the antithesis of good faith. It was also apparent that there was no factual basis for the contention that the project was not economically viable with more appropriate setbacks. Economic viability of a private project has never been a recognized basis for land use decision making. It is patently unfair and inappropriate to burden existing property owners for the private financial gain of private developer.

(iv) Board of County Commissioners Hearing on May 31, 2006.

The final chapter in this saga played out on May 31, 2006. In response to letters received from Sagebrush, County Planning Staff relayed to the Commissioners the contents of the correspondence as well as meetings with the Applicant subsequent to May 3. Planning Staff understood that Sagebrush intended to review the record and consider the range of setbacks identified by the Commissioners. A discussion was to follow regarding either fixed or variable setbacks. (*see* Verbatim Transcript of Proceedings, May 31, 2006, Pages 9-13, 13-21) Sagebrush's legal counsel made a presentation to the BOCC followed by comments from the Commissioners that they may consider a 2000 foot setback from nonparticipating property boundaries and a setback of 2500 feet from an existing residence. *Id.* at 34, 36-38. Applicant responded by indicating again that the setbacks would make the project not economically viable. *Id.* at 41-42. And as with prior assertions, no data or substantiation was provided to

support the proposition that the project would no longer be economically viable with the proposed setbacks. It was also significant that the setbacks were from "nonparticipating" properties. Applicant was free to negotiate lesser setbacks with the property owners.

Chairman Bowen then asked counsel for the Applicant: "...do you have information with you today that could help us to see if that's viable or not?" The answer illuminates the absolute lack of any good faith on the part of the Applicant to even attempt justification for its refusal to objectively shoulder its burden for providing data establishing that the setbacks it was proposing (or was objecting to) were or were not adequate to mitigate known impacts.

> MR. TIM MCMAHON: I was afraid you were going to ask me that question. All I can tell you is the information we provided you in the correspondence is that a half-mile setback reduces the project in half and doesn't leave a sufficiently viable project. That's the information I have back from my client. (Emphasis added)

No reference to the record. No economic data as to the number of turbines required to make the project economically viable. And no explanation of economic viability or site limitations or constraints. Board of County Commissioners had no factual or record basis to evaluate the assertions or consider alternatives. These absences stand in stark contrast to the findings of the DEIS that significant impacts would result from this project—impacts acknowledged by the Applicant to require distances greater than 1350 feet. Sagebrush simply chose not to participate further in the hearing process. This withdrawal was not a good faith effort. BOCC had requested information for nearly a month and there was no substantive support for the declared proposition.

The key issue in siting of any wind resource facility, including this one, is its proximity to and impact on surrounding land uses and residences. Despite the boxes and boxes of material submitted by the Applicant for the record, some of which may be interesting, but most of which is totally irrelevant to the key questions, Applicant totally failed to produce a shred of substantive and useful information for the County to assist in the assessment of mitigation alternatives.

Sagebrush refused to discuss variance procedures that could allow for exceptions from the setback requirement for particular tower locations. The best that can be said for the Applicant is that it pointed to the "typical" wind farm project where 1000 foot setbacks from neighboring properties were apparently used. Not a single project, however, in the state of Washington was identified with similar impacts on adjoining properties. Virtually all approved projects were in remote areas with no adjacent residential development. This was certainly true in Kittitas County where the Wild Horse project had no development conflicts.

DEIS confirms that several significant environmental impacts will result from this project on neighboring properties. That effective mitigation is a function of setbacks and distance. It is also recognized that aesthetic impacts are unavoidable significant adverse impacts. But, what did the Applicant provide to the County? It proposed 1000 foot setbacks with no justification whatever for that distance and then increased it to 1350 feet, again with no substantiation. Was 1000 feet inadequate? Was 1350 adequate? Why? The claim the Applicant made that any greater setback would make the project no longer economically viable was likewise unsubstantiated, but this Council, just as the County has absolutely no information in the record on that point, either.

Instead, and what the Applicant offers in supposed verification of its good faith effort to resolve this key issue with the County. Sagebrush's Opening Brief hides or disregards the significant factual deficiencies and chooses to collaterally attack the wind farm resource ordinance; procedural and hearing processes; and the failure of BOCC to delegate authority. Of the seven points the Applicant attempts to make to establish its good faith, six relate directly to the terms, operation and validity of the County's land-use regulations and procedures. What the Applicant fails to do, however, is to point to any authority or jurisdiction possessed by EFSEC under Chapter 80.50 RCW review and decide such issues. *See* RCW 80.50.040. Those challenges should have been made to the courts and this forum is totally inappropriate for the back-door effort initiated by Sagebrush.

The Applicant provides no guidance to the Council as to what constitutes a "good faith effort." Established case law uses the term with some

frequency but fails to provide much definition. But, that is not to say that a good faith effort is simply in the eye of the beholder. A good faith effort is a question of fact established through the record. *State v. Whittaker* 133 Wn.App. 199, 135 P.3d 923 (2006). Although it deals with the State's obligation to produce a witness at trial, *State v. Smith* 148 Wn.2d 122, 59 P.3d 74 (2002) does provide some elements that generally apply to establishing a good faith effort. One need not perform a futile act but "if there is a possibility, albeit remote, that affirmative measures might produce the [objective result], the obligation of good faith *may* demand their effectuation." *State v. Ryan* 103 Wn.2d 165, 172 691 P.2d 197 (1984).

Sagebrush bears the burden of establishing its good faith efforts. Despite all of the self-serving comments and unsubstantiated criticisms of BOCC, one fact is clear and undisputed – Sagebrush walked away from the hearing process and refused to identify substantive information regarding setbacks or economic viability. BOCC was let with no alternative since it would be clearly illegal to approve a project with mitigation measures that lack substantive support in the record. And it would be grossly improper to approve a project because it is necessary to support a private developer's profit and economic interests.

Sagebrush failed to make its case with the County, and, as Commissioner Huston opined, it now comes to EFSEC with a request to ignore the considerable effort of Kittitas County and the countless hours committed by the public and property owners to secure a fair outcome of this extraordinary process. EFSEC is not an excuse to reject the valued local process but a forum that should validate this process. It is not a tribunal to second guess or engage in "Monday morning quarterbacking." Kittitas County gave Sagebrush every opportunity to make their case and the Applicant chose to withdraw from the process. Sagebrush cannot support good faith on this record.

(b) Applicant Has Failed to Establish the Second Requirement of WAC 463-28-040 – Failure to Reach Agreement.

The second element to be established under WAC 463-28-040 is that the applicant and local authorities were unable to reach an agreement which would resolve the issues. WAC 463-28-040(2). Sagebrush withdrew from the process; failed to

provide requested information; and made unsubstantiated claims based on economic viability. A unilateral withdrawal cannot be the basis for preemption.

The transcript of the exchanges between the County and the Applicant on the setback issue speaks for itself. Incredibly, the Applicant at the bottom of page 60 of its brief complains of an empty record concerning the establishment of setbacks. From the outset, the County made clear to this Applicant that, consistent with this Applicant's processing of the Wild Horse project, each application must rise or fall on the specifics of the site. It was not the County's burden to justify any particular distance and it repeatedly asked for this information from the Applicant. It was never provided, and the Commissioners, having independently arrived at a setback range they felt would be necessary to deal with the impacts of this project, continued to hold open the option of discussing different distances or even a variance process if the Applicant would come forward to justify those considerations. The Applicant elected not to and cannot now complain of the state of the record.

Under WAC 463-28-040(2) the point is not, as the Applicant asserts a lack of understanding on the part of the County as to aesthetic impacts and proposed mitigation. Rather, the question is whether the County and the Applicant have failed to reach an agreement on the issues. By its very definition, agreement requires mutuality, and the failure to reach agreement requires fixed and final positions of the parties that cannot be reconciled. Kittitas County was open to further discussions and Sagebrush was not open to such dialogue. Preemption cannot be premised upon a unilateral decision to withdraw from the local process.

Sagebrush makes the following arguments regarding inability to resolve noncompliance issues: (i) EFSEC has sole preemptive authority to address site-specific aesthetic issues; (ii) the record does not support the County's determinations regarding aesthetic impacts; and (iii) Sagebrush's mitigation proposals adequately address aesthetic issues. None of these contentions are legally or factually supportable. And it must be remembered that Sagebrush withdrew from the process.

(i) EFSEC Does Not Have the Sole Preemptive Authority to Address Site-Specific Aesthetic Siting Issues.

Sagebrush incorrectly asserts that "lead agency" status equate to a transfer of "all authority to EFSEC" for purposes of environmental decision making. Reliance is placed on WAC 197-11-930 which deals with a private project applications where a single entity has jurisdiction. This project has multiple entities with jurisdiction including Kittitas County. Lead agency authority can be assigned by agreement or other process. WAC 197-11-926(1). EFSEC is lead agency for joint proposals. WAC 197-11-938.

A lead agency is the agency with ". . . the main responsibility for complying with SEPA's procedural requirements. . ." including threshold determinations and preparation of Environmental Impact Statements (EIS). WAC 197-11-050. Any governmental action on a private proposal ". . . may be conditioned or denied under SEPA to mitigate environmental impacts. . .." WAC 197-11-660. Kittitas County has full authority to mitigate or deny the application for comprehensive plan amendment, rezone, project permit or development agreement. Lead agency status has nothing to do with substantive SEPA authority.

(ii) Kittitas County Had Authority and Factual Record to Support Decision on Aesthetic Grounds.

Sagebrush next argues that the ". . . record does not support the County's determination related to aesthetic issues." Sagebrush Opening Brief 62-67. As a beginning proposition, this is a challenge to the land use decision and should have been appealed to Superior Court under Land Use Petition Act (LUPA). RCW 36.70C.030. LUPA serves as the exclusive means of judicial review of land use decisions, unless a specific exception applies. *Washington Shell Fish Co. v. Pierce County,* 132 Wn.App. 239, 248, 131 P.3d 326 (2006). A failure to file such appeal precludes collateral attack in this proceeding.

The essence of Sagebrush's argument is that their side of the story should be believed and all other testimony and evidence disregarded. Neglected in the argument is the fact that BOCC visited other wind energy projects; had a project under construction within the County (Wild Horse); entertained dozens of hours of public testimony; accepted thousands of exhibits; and reviewed the EIS. Addendum to EIS recognizes the following: (a) permanent conversion of approximately 93 to 118

acres would be an unavoidable impact of the project (Addendum FEIS 3.6.6); (b) scenic views of regional importance would be adversely impacted (FEIS Addendum 3-25); and (c) site specific impacts are substantiated. FEIS Addendum concludes:

> The Draft EIS concluded that for many viewers, the presence of the wind turbines represent a significant unavoidable adverse impact because it significantly alters the appearance of the rural landscape over a large area of Kittitas County.

FEIS Addendum 3.9.5. This conclusion did not change with the revision of the project site plan and layout. Kittitas County was justified in denying the application on this basis alone. The "looming" effect was a significant factor.

An applicant must also establish that alternate locations within the County have been reviewed and found unacceptable. WAC 463-28-040(3) Record of this Application and that of the Wild Horse project previously before this Council clearly establish areas in Kittitas County suitable for wind farm development and also possesses a high probability of being consistent with local land use regulations. Commissioner Huston stated as much. (*see* Verbatim Transcript of Proceedings, April 12, 2006, Page 65) Notably, the Wild Horse project itself, done by this very Applicant, has room for expansion, and this Applicant acknowledged but pleaded ignorance of the energy project proposed on land immediately south of Wild Horse. Now EFSEC has a new application filed by Enexco in the last week seeking to site a wind power generating facility in the county. This new filing further demonstrates there are alternative locations for this type of facility in Kittitas count.

Environmental analysis included alternative sites with lesser impacts on the environment. Wild Horse specifically allowed for accomplishment of project purposes and is now in operation. And it was developed by Horizon. The analysis under WAC 463-28-040(3), however, does not stop with the FEIS as suggested by Sagebrush. Preemption requires that alternative locations be reviewed and found unacceptable. There is no record in this proceeding of either consideration.

Kittitas County contains massive quantities of properly zoned properties. The entire eastern and southeastern portions of the county are suitable for such development. But none were studied or found unacceptable. The simple fact that

there is a new application (Invenergy) in this area attests to discount this proposal in post-hearing briefing. The fact is that the area was not studied. It is not the responsibility of Kittitas County to identify alternative sites. It is Sagebrush's responsibility.

IV. CONCLUSION

ROKT requests that the request for preemption be denied. The public has predicated in the development of the Wind Energy Ordinance; commented on environmental review; and participated in all public hearings. Their voice should not be marginalized or discounted. They are the persons forced to live with the profound changes and the residents of the affected community. And respect the local process and decision makers. This is not the case for EFSEC's first exercise of preemption authority.

Respectfully submitted this 13th day of November, 2006.

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